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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5435 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes.

2. To be referred to the Reporter or not? Yes.

3. Whether Their Lordships wish to see the fair copy of the judgement? -

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? -

5. Whether it is to be circulated to the Civil Judge?

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KUMAR G MEHTA

Versus

GUJ. HOUSING BOARD

Appearance:

MR DC RAWAL FOR MR MR ANAND for Petitioner

MRS KETTY A MEHTA for Respondent No. 1

CORAM : MR.JUSTICE KUNDAN SINGH

Date of decision: 11/02/99

ORAL JUDGEMENT

This petition has been filed on behalf of 10 persons mentioned in the list Annexure-A by the Safai Kamadar Sangh for a direction to the respondents to treat termination of the service of the persons mentioned in Annexure-A as illegal, unconstitutional and null and void and to treat their service as continued as if they were not terminated at all.

2. The persons mentioned in Annexure - A were the employees of the Gujarat Housing Board-respondent no. 1. Nine persons out of 10 persons filed claim petition before the appropriate authority for their regularization in service. The matter was referred to the Labour Court in Reference LCD No.94/80. The Labour Court after giving a reasonable opportunity to the parties concerned, rejected the demands no. 1 to 3 as not pressed and with regard to demand no. 4 the Gujarat Housing Board was directed to make permanent 9 persons by the order dated 5-11-1984. One Vashram Harji 10th employee was senior most but could not be impleaded in the proceedings before the Labour Court. As such, the Labour Court directed these persons to be appointed on regular basis in regular pay scale of Rs. 196-232 with effect from 1-1-1984. On 1-10-1986 the "Safai Kamdar" were simply told orally by the Time Keeper in/charge that their services were not required in future as per the instructions from the higher authorities. It appears that these 10 "Safai Kamdars" were working in Nari Road Housing Complex, Bhavnagar and that complex was taken over by the Corporation vide the Resolution no. 87 dated 29-10-1983 and that Nari Road, Bhavnagar complex as taken over with civil amenities for a lump sum amount of Rs. 10,000/for this work. As the "Safai Kamdars" were not taken over by the Corporation hence they preferred this application.

3. An affidavit-in-reply has been filed by the Dy. Executive Engineer, Gujarat Housing Board, Bhavnagar, wherein it is stated that the persons mentioned in Annexure-A to the petitioner were work-charge employees except Sr. no. 1 who was muster role employee. It is also stated in the affidavit-in-reply that the procedure as provided in law was followed before retrenching them from service. Required notice was also sent and on

30-9-1986 and the persons mentioned in Annexure-A were personally called and the notice was given and also offered retrenchment compensation. But they refused to accept the notice or compensation amount. As such, the demand draft of retrenchment compensation was sent by registered post on the same day. But all of them have refused to accept the same. The Dy. Secretary has denied that the petitioners were appointed on regular posts with effect from 1-1-1984 and that they were given regular pay scale. However, Vasahat in question was transferred to the Bhavnagar Municipal Corporation by the Housing Board. Hence, the services of the persons mentioned in Annexure - A were terminated in accordance with law and in accordance with the provisions of the Industrial Disputes, Act.

4. It appears that the Dy. Executive Engineer and the Gujarat Housing Board was totally ignorant or avoiding to accept the adjudication of the award of the Labour Court dated 5-11-1984 and that award has not been challenged by the Gujarat Housing Board at all anywhere and therefore that has become final. It is further asserted in the affidavit-in-reply that the aforesaid persons who were junior most amongst the work charged Safai Kamdars were working in the Nari Road Housing Complex, Bhavnagar and their services were surplus and it was denied that they can be transferred to any other colony as alleged in the petitioner. The services of those employees were attached to the work of "Safai" in the Anand Nagar and Bharat Nagar colonies at Nari Road, Bhavnagar were not required by the Board. But there is nothing on record to show that the employees were junior most except the bald statement of the Deputy Secretary particularly their services have already been regularised by the Labour Court. Though it is admitted that all the liabilities of the said colonies for the civil amenities were taken over by the Municipal Corporation the employees mentioned in Annexure-A were surplus and their services were not required by the Gujarat Housing Board as the other "Safai Kamdars" were already working in other Housing Colony and they were senior to the persons mentioned in Annexure - A who are terminated from service. The aforesaid employees persons cannot be transferred to other colony as there was no vacancy there.

5. The Sur-Rejoinder affidavit has been filed by one H.S. Patel, of behalf of the Corporation wherein it is stated that the services which have been undertaken by the Corporation under the agreement with the Gujarat Housing Board are being done by "Safai Kamdar" who are

the employees of the Corporation and no private contract has been given by the Corporation. Though it is also admitted that the Corporation has given a contract for cleaning septic tanks of the colony to one Jayantibhai Mohanbhai on 31-5-1986. The said work was not done by the persons mentioned in Annexure-A but it was done always by the private contractor.

6. Learned counsel for the petitioner contended that the fundamental right of life i.e. means of livelihood has been provided under Article 21 of the Constitution of India. Termination of service of any employee/workman visits the civil consequences of jeopardizing not only his/her livelihood but also career and livelihood of dependents. Therefore, before taking any action putting an end to the tenure of an employee/workman fair play requires that a reasonable opportunity to put forth his case is given and domestic inquiry is required to be conducted complying with the principles of natural justice. In support of his contention he relied upon the case of D.K. Yadav Vs. J.M.A. Industries Ltd., reported in 1993 (3) SCC 259.

7. The main contention of the learned advocate for the petitioner is that the persons mentioned in Annexure-A were discharging their duty of the permanent nature under the Gujarat Housing Board and their services were made permanent by the Labour Court with retrospective effect and treated them as regular servants of the Municipal Corporation with regular pay scale. The persons mentioned in Annexure-A were working at Nari Road Complex, Bhavnagar and that complex was taken over by the Municipal Corporation. It was the duty of the respondent no. 1 to make necessary arrangement for deputing services of the persons mentioned in Annexure-A to the Corporation or the Gujarat Housing Board should have allotted the work to them through the other local authority or under its control. But it is not so done. On the other hand, the services of the aforesaid persons were terminated by the oral order without following the due procedure laid down under the provisions of Sec. 25-FF of the Industrial Disputes Act and considering the aforesaid persons as work charge employee retrenched their services. The respondent no. 2 Corporation has taken over the Nari Road Complex, Bhavnagar with all the amenities except the persons who were working there. The Municipal Corporation ought to have taken the services of the persons mentioned in Annexure-A as continued and for that purpose the Corporation have engaged the other persons and for that purpose the aforesaid persons were

the best persons who are working continuously in that area. The action of the respondents is wholly arbitrary and against the principles of natural justice and unconstitutional. The learned counsel for the petitioner has relied on the case of Gurmail Singh And Others Vs. State of Punjab And Others reported in 1991 (1) SCC 189, wherein it has been held "The appellants were in service as tubewell operators in the Irrigation Branch of the Public Works Department of the Punjab State. The State took a decision to transfer all the tubewells in this branch to the Punjab State Tubewell Corporation, a company wholly owned and managed by the State of Punjab. Accordingly, the appellants were served with a notice in terms of Section of Sec. 25-FF of the Industrial Disputes Act, terminating their services and abolished the posts sanctioned for the tubewell circle Irrigation Branch. The employees of the predecessor had no right to claim reemployment by the successor in business save in exceptional circumstances. Even where available, that claim was not a matter of absolute right but one of discretion, to be judicially exercised, having regard to all the circumstances. An Industrial Tribunal, while investigating such a claim, had to carefully consider all the aspects of the matter. It had to examine whether the refusal to give reemployment was capricious and industrially unjustified on the part of successor in business or whether he could show cause for such refusal on reasonable and bona fide grounds such as want of work, inability of the applicant to carry but the available work efficiently, late receipt of the application for reemployment in view of prior commitments or any other cause which in the opinion of the tribunal made it unreasonable to force the successor-in-interest to give reemployment to all or any of the employees of the old concern. This, discretion given to industrial Courts is no longer generally available because of the insertion of S.25-FF. Section 25-FF of the Industrial Disputes Act, provides that where there is transfer of an undertaking by agreement or operation of law, an employee who loses his job because of such transfer will have a right to compensation from the predecessor, except where he gets the benefit of uninterrupted service with the new employer on no less favourable terms than before and will be entitled to compensation in case he should be retrenched later by the new employer. If a transfer is fictitious or benami, S. 25-FF has no application at all. In such a case, "there has been no change of ownership or management and despite an apparent transfer, the transferor employer continues to be the real employer and there has to be continuity of service as before and there can be no question of compensation." A second type

of cases which comes to mind is one in which there is in form, and perhaps also in law, a succession but the management continues to be in the hands of the same set of persons organized differently. In such cases, the transferee and transferor are virtually the same and the overriding principle should be that no one should be able to frustrate the intent and purpose of the law by drawing a corporate veil across the eye of the Court. These exceptions to the above rules, would still be operative. But it is necessary here to decide whether this principle will help us to identify the corporation with the State Government for the present purpose particularly, as there is a catena of cases which do not approve of such identification. There can be an exception to the principle behind S. 25-FF. This is where, as here, the transferor and/or transferee is a State or a State instrumentality, which is required to act fairly and not arbitrarily and the Court has a say as to whether the terms and conditions on which it proposes to hand over or take over an industrial undertaking embody the requisite of "fairness in action" and could be upheld. In such circumstances, it will be open to this Court to review the arrangement between the State Government and the Corporation and issue appropriate directions. Indeed, such directions could be issued even if the elements of the transfer in the present case fall short of a complete succession to the business or undertaking of the State by the Corporation, as the principle flowing from the contours of Article 14 of the constitutional the State and Corporation are obliged to adhere to.

8. On the basis of the principle laid down by the Supreme Court the learned counsel for the petitioner submitted that one limb of the State has transferred the limb to other limb of the State. The respondents have committed an error in not handing over and to take over the work of the aforesaid persons which is an infringement of the fundamental rights under Article 14 of the Constitution of India.

9. Learned State counsel contended that retrenchment of the persons mentioned in Annexure-A was perfectly justified and was in accordance with the provisions of Sec. 25-FF of the Industrial Disputes Act. The services of the aforesaid persons were not transferred but the colonies were taken over by the Corporation and hence retrenchment compensation was also given to the aforesaid persons but that was not accepted by them, hence the decision of the authorities was fully justified in law.

10. I have considered carefully the submissions made on behalf of the parties. The aforesaid persons were working for more than 9 to 13 years in the respondent Housing Board and they were directed by the Labour Court to be regularized and they were entitled for regular pay scale. The Gujarat Housing Board has not expressly transferred the services of the aforesaid persons to the Corporation, but it will be deemed indirectly that their services have also been transferred to the Corporation as the work of the said persons were of permanent nature and that work was required to be done by aforesaid persons or any other person. The defence of the respondents is that the work was being done by the employees of the Corporation is not justifiable. However, all work has been done by the aforesaid petitioners that will be deemed to have been done continuously after taking over the said Housing Complex by the Corporation on transfer. That work was available for the aforesaid persons and that has been done by transfer of new employees or by the employees engaged by the contractor. Retrenchment is not allowed by the Supreme Court in the circumstances where the work was available and the transfer was made in formal nature from one limb of the State to another limb of the same State.

11. In the present case, Nari Road Housing Complex, Bhavnagar was taken over by the respondent Corporation and the work was available it was the duty of the Corporation to engage the aforesaid persons continuously. The action of the Corporation is not justified at all and retrenchment of the aforesaid persons - employees cannot be allowed at all and that was also illegal and is not sustainable in the eye of law in view of the rule laid down by the Supreme Court.

12. So far as the back wages of the aforesaid persons - employees are concerned, they were illegally retrenched though they were available for the same hence they are entitled to half back wages from the date of termination till the date they are allowed to join their duty.

13. Accordingly, the petition is allowed and the BHavnagar Municipal Corporation is directed to take over their services, allow them to work forthwith and regularize the persons mentioned in Annexure- A of the petition with continuity of service in the regular pay scale as regular employee of the Corporation and the Corporation is further directed to give 50% of back wages from the date of termination i.e. 1-10-1986 till they are allowed to work under its control.

14. Accordingly, rule is made absolute to the aforesaid extent, with no order as to costs. Interim order, if any, stands vacated.

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/JVSatwara/